Supreme Court, U. S.
FILED
JUL 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2031

THE TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY, A DELAWARE CORPORATION,

Petitioner,

vs.

CHARLES N. WASSON, d/b/a WASSON TOWING COMPANY, OWNER AND WASSON TOWING SERVICE, INC., BAREBOAT CHARTERER OF THE MOTOR VESSEL DEL RIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 1974

Gunthorp-Warren Printing Company, Chicago • 346-1717

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The petitioner, Toledo, Peoria and Western Railroad Company, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered April 17, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 495 F. 2d 571 and is reproduced in the Appendix hereto. The findings, decision and orders of the District Court [S.D. Ill. N.D. (Peoria, Illinois)] are not reported and also appear in the Appendix.[1]

1. District Court findings and decision and order on damages appear in the Appendix *in haec verba* from page 26 to page 38 of respondents' Appendix in the Seventh Circuit.

JURISDICTION

Respondents instituted this action for exoneration from or limitation of liability under 46 U.S.C. §§ 183-189. Federal jurisdiction also exists under 28 U.S.C. § 1333 and 46 U.S.C. § 740.

The judgment of the Court of Appeals was entered on April 17, 1974 and this petition for certiorari was filed on or before July 16, 1974.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

Does 33 U.S.C. § 401 and Ill.Rev.Stat. Chap 121 § 193(a) permit the Seventh Circuit to use the rule of the *Pennsylvania,* 86 U.S. 125 and reverse the District Court's finding that admiralty's equal division of damages rule should not apply to impose liability on petitioner bridge owner for damages caused by respondents' unseaworthy vessel?

2.

Does admiralty's equal division of damages rule apply where respondents' unseaworthy vessel collides with petitioner's railroad bridge and contributory fault is presumed by the Seventh Circuit's strict application of the rule of the *Pennsylvania, supra?*

STATUTES INVOLVED

UNITED STATES CODE, Title 33

§ 401. *Construction of bridges, causeways, dams or dikes generally*

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or

causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: * * *

§ 403. *Obstruction of navigable waters generally; wharves; piers, etc., excavations and filling in*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; * * *

UNITED STATES CODE, Title 46

§ 740. *Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period*

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: * * *

ILLINOIS REVISED STATUTES, 1969, Chapter 121

§ 193a. *Bridge pier protections, construction of*

Every person, firm or corporation owning, leasing or managing any bridge over a navigable portion of the Illinois River shall construct and maintain in good repair, contiguous to the channel of the river, adequate pier protection for the piers of such bridge, of modern construction, and adequate to meet navigation requirements existing at the time or reasonably to be expected in the future during the life or such piers.

STATEMENT OF THE CASE

On February 12, 1970, respondents' vessel was proceeding down the Illinois River and collided with the east channel pier of petitioner's railroad bridge.

The respondents, Charles N. Wasson, as owner, and Wasson Towing Service, Inc., as bareboat charterer of the Del Rio brought this action for exoneration from or limitation of liability in the District Court for the Southern District of Illinois, Northern Division. After making the usual disclaimers respondents' complaint alleged that "the casualty was caused in whole or in part," by the petitioner because it did not "provide adequate pier protection as required by Ill.Rev.Stat. 121, 193a (1969)".[2]

Petitioner denied that respondent was entitled to exoneration, limitation and the benefits of Admiralty's equal division of damages principle.

After a non-jury trial the District Court found: (1) That respondents' vessel was unseaworthy; (2) That the petitioner was not contributorily at fault; and (3) That the unseaworthy condition of the vessel constituted the proximate cause of petitioner's damages. [App. A28.]

2. Complaint, par. 14, Resp. App. (7th Cir.) p. 16.

Thus, the District Court decided "all of the essential issues here in favor of Claimant" and entered judgment assessing petitioner's damages at $878,650. [App. C, A35.]

Classified in terms of circumstances and the respective liabilities of the respondents and petitioner, the District Court's findings are summarized as follows:

Findings of the District Court

1.

Circumstances

1. Petitioner owned and operated a railroad bridge spanning the Illinois River between Peoria and East Peoria, Illinois [App. B, A25] and the Franklin Street bridge is immediately above or upriver and because petitioner's bridge crosses the river at an angle rather than perpendicular, the distance between the east channel pier of the Franklin Street Bridge and the east channel pier of the Railroad bridge—the pier involved—is approximately 350′. [App. B, A26.]

2. On February 12, 1970 the motor ship Del Rio, pushing 12 barges loaded with grain, was sailing downstream in the Illinois River and constituted a single vessel [App. B, A25] with barges arranged 3 wide and 4 long. The total length by width of the barge tow was 785′ by 105′ and the stem to stern length of the vessel was 896.3′. [App. B, A26.]

3. On February 12, 1970, Pier 3 (pier involved) was not protected by previously existing shear fencing because: (a) The State of Illinois owned the Franklin Street bridge and removed its 208.8′ part of the continuous fencing running between the east channel piers of each bridge and (b) "Numerous prior hammerings of river traffic, primarily large tows of steel barges" continuously damaged and destroyed the petitioner's remaining open-ended fencing. [App. B, A27.][3]

3. Claimant's [TP&W's] exs. 14-15 in the record of trial proceedings are reports of Wasson's 2/13/70 investigation by its marine

4. On February 12, 1970, the M-4, the port lead barge of the tow came in contact with the left descending or east channel pier of petitioner's bridge [App. B. A27] the pier broke off causing the fixed bridge span whose westerly end rested thereon to collapse and thereafter "the barge M-4 did ride up on the stub of pier 3 a distance of approximately the width of the said pier (27′ to 29′) and came to rest on top of said pier stub around 1′ above the then existing river level." [App. B, A27.][4]

2.

Unseaworthiness of Vessel

"The Court finds that the primary and effective cause of the collision on February 12, 1970 between the 'Del Rio' and the TP&W Bridge was the excessive width of the tow at 3 barges or 105′ wide, in conjunction with a length of 4 barges and a weight in excess of 40 million pounds, in conjunction with the known openings between bridge

---

surveyor and describe *post* 1967 problems concerning east channel pier protection thusly:

> Formerly due to this close to or near adjacent river crosing [sic], the bridges in the years past had their original sheer fence protections connected between bridge piers. Over the years both the T.P.&W. Railroad bridge and Franklin Street bridge changed their protection designs with updating of a type of protection near fully on the Franklin Street bridge and only partly on the T.P.&W. Railroad Bridge. The changes being to the Franklin Street bridge by eliminating a sheer fence and end pile cluster protection to large diameter steel sheet pile cell protections. This did away with any connecting to, continuous sheet fence protection between bridges as original or before. This Franklin Street protection change then left open upstream ends and a partial sheer fence protection above the T.P.&W. Railroad bridge, which proved subject to continual damage.

The photograph appearing as part of the Seventh Circuit's opinion reflects conditions as they existed before the State of Illinois removed its 208.8′ of upstream fencing.

4. The stub pier measured 10′ in shore to shore direction and 27′-29′ in the upstream-downstream direction. Hull damage to the M-4 was a rip or rupture open from 3′ to 13′ inboard from the port side.

piers of successive bridges not over 400′ apart involving openings of about 120′, leaving less than 15′ for lateral maneuvering between those bridges and the spans of the piers thereof requiring maneuvering close to the shore with recognized possibility of unfavorable navigational conditions developing therefrom and *the inability of the vessel rigged, as aforesaid, to stop forward motion when the danger of collision became apparent.* [Emphasis added.]

The Court finds that under these conditions the vessel in that configuration was not seaworthy . . .

Accordingly, the Court concludes, as a matter of law, that there can be no exoneration; that petitioners in this cause [Respondent Wasson] are liable for the damages to the Toledo, Peoria and Western Railroad Company and to Cargo Carriers, Inc.,[5] without limitation." [App. B, A27-A28.]

3.

Adequate Pier Protection and Contributory Negligence

a.

33 U.S.C. §§ 401 et seq.

Under its federal War Department permit (issued 4/22/36) petitioner was required to maintain 166′ of timber fender upstream from its left (easterly) pier extending from the pier to and connecting with the downstream end of the timber fender of the Franklin Street Bridge.[6] So predicated, the District Court found and concluded:

"The railroad fully complied with its War Department permit concerning the bridge until the State of Illinois, in

5. $13,993.90 stipulated to for damage to the bow and hull of the barge M-4. Cast in terms of joint tortfeasor rather than a contributorily negligent claimant; is petitioner equally liable for damage to port lead barge of vessel whose fault stems from inability "to stop forward motion when danger of collision became apparent"? Otherwise stated; is divided liability predicated on fault causing collision or fault causing greater damage?

6. From relevant portions of War Dept. permit issued under 33 U.S.C. §§ 40 *et seq.* on April 22, 1936, which is reproduced at page 220 of the Appendix filed by respondents in the Seventh Circuit.

1967, removed its continuance sheer fence for a distance of 208.8′ downstream from the Franklin Street Bridge." [App. C, A31.]

"Neither government authority nor any shipping or barge freight interests asked or ordered the railroad to alter its fencing or pier protection."[7] [App. C, A31.]

"The Court further finds that there was no contributory negligence on the part of [petitioner] in permitting its bridge to exist on February 12, 1970 under the circumstances here otherwise found." [App. B, A28.]

"Accordingly, the petition for loss sharing under the statute and cases is denied." [App. B, A28.]

b.

Ill. Rev. Stat. 1969, Chap. 121 § 191(a)

"In substance, I do not think statutory or case law, as I have been able to read it, does mean that established structures in the navigable waters which have not been the subjects of any actions by any authority or navigation interests to be removed as hazards to navigation can be considered a hazard to navigation especially a structure which provides an open area for navigation 118 feet wide and embracing the channel on the sailing line and the swing span which is capable of being swung out of the way for navigation which would be too high to pass under the bridge otherwise.[8] [App. B, A24.]

I just do not think that river traffic can continuously increase its size and weight, length and breadth to the point where it becomes dangerous under the natural river conditions to navigate it through existing bridges which I think

7. These findings meet the criteria in *Oregon* v. *Tug Go-Getter*, 299 F.Supp. 269 (D.C. Ore. 1969) which holds that bridge owner "could not have altered the structure . . . by the additions of dolphins and fenders without the authorization of the Chief of Engineers and the Secretary of the Army" and that the owner has no duty to barge freight interests "to petition the appropriate officials for permission to make changes in the bridge's structure." [299 F.Supp. at 273, 274.]

8. The photograph appearing at 495 F.2d at 576 [App. A8] shows petitioner's bridge with "the swing span . . . swung out of the way for navigation."

> are presumed to be there as a matter of right after any substantial number of years without action being taken by navigation interests to remove them." [App. B, A25.]

The Court of Appeals reversed in part holding "that the District Court was in error in finding the railroad company free from liability and being of the opinion that this case clearing calls for the application of the divided-damages rule of admiralty." [495 F.2d 584 (App. A, A22).] It principally relied on the rule of *The Pennsylvania*, 86 U.S. 125 (1874) and found contributory fault by applying it to the District Court's abstract finding that "On February 12, 1970, Pier 3 (pier involved) was not protected by previously existing sheer fencing." [*Ante*, 5.]

Under the impact of the twin presumptions of fault and contributory causation of half the damages the Seventh Circuit has here held:

> "It was error for the District Court to have failed to apply the *Pennsylvania* rule in view of its findings and the evidence in the case. Under the well-established admiralty rule of divided damages, where two parties are at fault in causing a collision and resulting damages both parties must bear equally the damages caused by the collision." [495 F.2d at 584 (App. A, A22).]

REASONS FOR GRANTING THE WRIT

The questions presented raise substantial issues concerning the inflexible application of what this Court recently referred to as "An admiralty doctrine of ancient lineage provides that mutual wrongdoers shall share equally the damages sustained by each." [*Cooper Stevedoring Company* v. *Kopke*, ... U.S. ....., 42 LW 4796 (5/28/74).] Moreover, "The interests of safety dictate that where two parties 'are both at fault, they should bear the damage equally to make them more careful.' *The Alabama*, *supra*, 92 U.S. at 697. And a 'more equal distri-

bution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may be equally or more to blame." [*Cooper Stevedoring Company* v. *Kopke, supra* (42 LW at 4795).]

Here, the District Court made findings based on reality and found that petitioner's failure to provide "adequate pier protection" at the time of the collision did not constitute contributory proximate cause in light of circumstances, including: (1) the removal of the continuous fencing by owners of the Franklin Street Bridge, and (2) the destruction of the open-ended fence by "hammerings of river traffic, primarily large tows of steel barges." [*Ante,* 5.] Furthermore, the casualty itself proves that steel pile cell protections would not have prevented the port bow and side of respondents' unseaworthy vessel from being a number of feet of the easterly channel line, thus making them the primary cause of the collision.

In short, the unseaworthy "inability of the vessel . . . to stop forward motion when the danger of collision became apparent" caused the collision to occur and it was only thereafter that pier protection or its absence could operate as a possible cause contributing to the extent of the damage resulting from "the primary and effective cause of the collision"—the unseaworthy conditions of respondents' vessel.

Analogizing non-contractual indemnity principles it is necessary to draw a qualitative distinction between the tortious conduct of the two tortfeasors and where indemnity has been allowed the conduct of indemnitor has sometimes been characterized as the primary cause of the harm and that of the indemnitee has been described as the secondary cause. [See e.g.: *Standard Oil Co.* v. *Robbins Dry Dock & Repair Co.,* 32 F.2d 182 (Cir. 2, 1929); see also, *Leflar, Contribution and Indemnity Between Joint Tortfeasors,* 81 U. of Pa. L. Rev. 130, 151; *Restatement of Restitution* § 95].

1.

The Decision Below Conflicts with the Decision of the Ninth Circuit in State of Oregon v. Tug Do-Getter, 468 F. 2d 1270.

Respondents "accept(ed) the findings of fact of (District) Judge Morgan", did "not controvert the specific finding of fact made by Judge Morgan" and "All of (their) contentions are advanced as a matter of law and are based upon findings of fact by the lower court."[9] Thus, the decision of the Seventh Circuit is bottomed on the determination that petitioner had a duty to respondents to protect its bridge against the dangers created by the unseaworthy vessel. And in case context that means that "If navigation requirements should increase during the life of the structure, the owner must rebuild if necessary" and that, "that duty includes the duty to construct and maintain adequate sheer fencing or other pier protection so as to minimize the adverse impact on navigation".[10]

This is but another way of saying that petitioner had no right "to insist that river traffic avoid contact with its bridge and avoid using the piers as if they were a ferry slip." In *Oregon* v. *Tug Go-Getter,* 468 F.2d 1270 (1972) the Ninth Circuit reversed the District Court's application of a 40% depreciation allowance because "the hazards of river traffic gave the piers an independent life expectancy of their own." That Court of Appeals declared that "Those hazards cannot in this case be imposed on the owner of the bridge but must be assumed by the vessel creating the hazard." [468 F.2d at 1274.]

Whether it be labeled the assumed risk of accelerated depreciation, contribution and indemnity among joint tortfeasors or comparative 50/50 negligence, the impact is ultimately on compensatory remedy bottomed on breach of duty to unsea-

9. Respondents' [Appellants'] Brief (7 Cir.) pages 21, 38 and 49.

10. Respondents' [Appellants'] Brief (7th Cir.) page 48.

worthy or negligent vessels. Thus, the Seventh Circuit's decision that "the District Court err(ed) in finding the railroad free from Liability" [495 F.2d at 577 (App. A9)] is in direct conflict with the Ninth Circuit's decision that shipping hazards to bridge piers cannot "be imposed upon the owner of the bridge but must be assumed by the vessel creating the hazard." [468 F.2d at 1274.]

2.

The Decisions Below Raise Significant and Recurring Problems Concerning the Arbitrary Applications of Admiralty's Equal Division of Damages Principle and the Rule of Presumptive Fault Under the Pennsylvania, 86 U.S. 125 (1874).

The substantiality of the questions and their certworthiness does not require our extrinsic and subjective explications, In *Union Oil Company* v. *The San Jacinto,* 409 U.S. 140, 141 (1972), the Court stated:

> "The Ninth Circuit affirmed the finding that the San Jacinto had been negligent, but determined that the Santa Maria was also negligent in violating the 'half-distance' rule, 30 Stat. 99, 33 USC § 192 [33 USCS § 192]. That court therefore reversed with directions that the District Court determine the amount of damage sustained by the barge and assess damages under the divided-damages rule. See *The Schooner Catharine* v. *Dickinson,* 17 How 170, 15 L Ed 233 (1855). *We granted certiorari,* 405 US 954, 31 L Ed 2d 230, 92 S Ct 1177 (1972), *principally to consider petitioner's request that we abandon the divided damages-rule.*" [Emphasis added.]

And Mr. Justice Stewart concluded his dissenting opinion with the view that "Since I cannot say that the Court of Appeals . . . incorrectly concluded that the Santa Maria had violated the half-distance rule, and that she was unable to prove that her fault could not have contributed to the collision, *I would reach the question that we granted certiorari in this case to consider —the continued validity of the divided-damages rule. The*

Court, however, does not address that question, and I therefore, refrain from expressing my views upon it." [409 U.S. at 150 (Emphasis added).]

In *Union Oil, supra,* the operative factors involved a collision between two moving vessels, neither of which, were unseaworthy and both of which were found by the Ninth Circuit to have been actively negligent. Thus, the circumstances made it all but impossible for the Court "to determine whether contribution in cases, such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties." [*Cooper Stevedoring Company* v. *Kopke,* ..... U.S..... 43 LW 4795, fn. 2.]

Under traditional principles of equitable contribution and indemnity, together with the undisputed and undeniable facts, this case presents the question "four-square" in a judicially workable context.

1. The courts have found that the size, weight "and the inability of the vessel rigged as aforesaid to stop forward motion when the danger of collision became apparent" [*Ante,* 7] constituted unseaworthy conditions constituting the proximate cause of the initial collision *and* petitioner's damages.

2. While legal causation always focuses on injury or damage and not on collision, the fact remains that here, petitioner's failure to provide pier protection, even if tortious, could not have been a causative factor as to collision but only as to the nature and extent of the damages.[11]

3. In addition to being uninvolved in the cause of collision, petitioner's secondary liability has been used to make

11. In product liability context, the fault and causation factors are not unlike the so-called "second collision" theory of liability. [See e.g.: *Larson* v. *General Motors Corp.,* 391 F.2d 495 (8th Cir. 1968).]

> it equally responsible with the primary tortfeasor even though the primary tort constituted the antecedent in whose absence secondary responsibility could not have arisen.

It has long been the rule that damages in admiralty are given or withheld on the predicate of principles of equity and good conscience [*The Marianna Flora*, 11 Wheat 1] and it defeats rather than effectuates relevant principles of indemnity and contribution to arbitrarily divide damages equally without regard to circumstance nor degree of causative fault.

As Justice Harlan stated for the Court in *Moragne* v. *States Marine Lines*, 398 U.S. 375, 405 (1970):

> "The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today."

CONCLUSION

For these reasons, and others implicit therein, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

Complaint of Charles N. WASSON, doing business as Wasson Towing Company, owner of the MOTOR VESSEL DEL RIO, and Wasson Towing Service, Inc., Bareboat Charterer of the Motor Vessel Del Rio, for exoneration from or limitation of liability.

No. 73-1225.
[495 F.2d 571 (7th Cir.)]

PERRY, *Senior District Judge.*

This is an appeal from the decision of the District Court in an admiralty action for exoneration from or limitation of liability, founded upon 46 U.S.C. §§ 183-189 and brought by Charles N. Wasson as owner of the motor vessel DEL RIO and by Wasson Towing Service, Inc., as bareboat charterer thereof (collectively called 'Wasson"), with respect to a casualty which occurred in the Illinois River at Peoria, Illinois, when a grain-loaded barge being pushed by the DEL RIO collided with a pier of a railroad bridge which spans the river between Peoria and East Peoria and is owned by the Toledo, Peoria and Western Railroad Company (called "T P & W" or "railroad company").

The complaint alleged that on February 12, 1970 the DEL RIO was proceeding down the Illinois River, pushing a tow of barges, when it collided with a pier of a railroad bridge of the T P & W at Peoria, Illinois, causing severe damage to the bridge pier, Pier No. 3, and moderate damage to the port lead barge, BARGE M-4.

The complaint alleged that the DEL RIO was free from fault, and that Wasson was free from privity and knowledge; and prayed for relief under applicable statutes and rules.

Claims were filed by the bridge owner (T P & W, the railroad company) and by the barge owner (Cargo Carriers, Inc.). The

proceeding was tried without a jury. The active parties in the trial were Wasson and T P & W. Cargo Carriers, Inc., took no part, electing to abide the outcome.

At the conclusion of the trial the District Court found what he called "all of the essential issues" in favor of the railroad company. The court then entered judgment in favor of the railroad company and against the petitioners (Wasson) in the sum of $878,650; and in favor of Cargo Carriers, Inc., and against the petitioners, in the sum of $13,993.90.

At the conclusion of the trial on July 19, 1972, the District Court made findings pertinent to this appeal summarized as follows:

(1). On February 12, 1970 at about 6:05 A.M., the tow of the DEL RIO,—specifically BARGE M-4, the port lead barge of the tow,—came into contact with the left descending, or east pier, of the railroad bridge, with resulting damage to the barge and to the bridge.

(2). As known to the management of its owner and its charterer, on February 12, 1970 the DEL RIO was pushing 12 grain-loaded barges arranged 3 barges wide and 4 barges long. The total length of the tow was 785 feet for the starboard and center strings and 780 feet for the port string. The total length of the DEL RIO and its tow was 896.3 feet. The width of the tow was 105 feet.

(3). In such configuration, this vessel or tow was too wide at that length to be safely navigated through the various bridges at Peoria without damage to the bridges or to their appurtenances.

(4). The Franklin Street Bridge is located immediately upriver from the T P & W railroad bridge. Because the railroad bridge crosses the river at an angle rather than directly perpendicular to the river, the distance between the east channel pier of the Franklin Street Bridge and the east channel pier of the railroad bridge is approximately 350 feet.

(5). The railroad bridge was originally built in the mid-eighteenth century. Pier No. 3 of the railroad bridge (the east channel pier here involved) was renewed in 1906 or 1907.

(6). On February 12, 1970, the date of the collision, Pier No. 3 was not protected by previously-existing guidewall,—sheer fencing,—or by timber wale protection, such previously-existing protection having been destroyed by numerous prior hammerings of river traffic, primarily large tows of steel barges.

(7). The towboats LA SALLE and KAY-A and their respective tows had collided with the sheer fencing protecting Pier No. 3 on February 4th and February 19th, respectively, in 1969. The sheer fencing was not repaired or replaced following those collisions.

(8). When the port lead barge of the DEL RIO tow, the M-4, came into contact with the substantially-unprotected Pier No. 3 on February 12, 1970, the pier broke off, causing the fixed bridge span resting thereon to collapse.

(9). Immediately following the collision, BARGE M-4 rode up onto the stub of Pier No. 3 a distance of approximately the width of the pier and came to rest on top of the pier stub about one foot above the then-existing river level.

(10). The claim of Cargo Carriers, Inc., the owner of BARGE M-4, in the sum of $13,993.90 shall be allowed as damages payable only in case of liability of the DEL RIO or its owners or operators, and subject to the court's determination of the possible proportionate liability or limitation of liability as sought by Wasson.

(11). The primary and effective cause of the collision on February 12, 1970 between the DEL RIO and the railroad bridge was the excessive width of the tow of 3 barges of a total width of 105 feet, in conjunction with a length of four barges and a weight in excess of 40 million pounds, in conjunction with the known opening between bridge piers of successive bridges not over 400 feet apart involving openings of about 120 feet,

leaving less than 15 feet for lateral maneuvering between those bridges and the spans of the bridge piers, requiring maneuvering close to the shore with the recognized possibility of unfavorable navigational conditions developing therefrom and the inability of the vessel, rigged as aforesaid, to stop forward motion when the danger of collision became apparent.

(12). Under these conditions the vessel in that configuration was not seaworthy, and that lack of seaworthiness under the conditions then known to exist, was with the knowledge and privity of both the owner and the charterer of the vessel.

(13). There was no contributory negligence on the part of the railroad company in permitting its bridge to exist on February 12, 1970 under the circumstances here otherwise found.

In addition to the foregoing findings, the District Court made, *inter alia*, the following findings in its Decision And Order On Damages, entered November 16, 1972:

> 1. The railroad fully complied with its War Department permit concerning the bridge, until the State of Illinois, in 1967, removed its continuance sheer fence for a distance of 208.8 feet downstream from the Franklin Street Bridge.
>
> 2. Neither government authority nor any shipping or barge freight interests asked or ordered the railroad to alter its fencing or pier protection.

The District Court concluded as a matter of law, that there could be no exoneration, and that petitioners Wasson were liable for the damages to the T P & W Railroad Company and to Cargo Carriers, Inc., without limitation.

At the time of the occurrence herein there was in existence an Illinois statute, Chapter 121, Section 193a, Illinois Revised Statutes, 1969, which reads as follows:

> § 193a. Bridge pier protections, construction of.] § 1. Every person, firm or corporation owning, leasing or managing any bridge over a navigable portion of the Illinois River shall construct and maintain in good repair,

contiguous to the channel of the river, adequate pier protection for the piers of such bridge, of modern construction, and adequate to meet navigation requirements existing at the time or reasonably to be expected in the future during the life of such piers.

At the trial the petitioners introduced the following evidence which was not contradicted or impeached:

(1) By a War Department permit signed April 22, 1936 by the Chief of Engineers, the T P & W Railroad was authorized to reconstruct the timber guide walls (sheer fencing) at its bridge. As of August 31, 1936, the reconstruction work had been completed in substantial accordance with the plans and the provisions of the War Department permit.

(2) Prior to the issuance of the permit, Lt. Col. Connolly, District Engineer, Corps of Engineers, wrote the following letter to the Superintendent of the T P & W Railroad Company:

T. P. & W. R. R. Co.
Union Station
Peoria, Illinois

Attention: Mr. O. W. Limestall, Superintendent

Gentlemen:

On April 9, 1934, your application for a permit to rebuild the fenders at your Illinois River bridge at Peoria was returned with the request that the plans be modified to provide principally for greater strength.

The City of Peoria is now completing work on the extensive reconstruction of fenders at its Franklin Street bridge located just upstream, and in September, 1932, the Illinois Terminal Railroad System completed work on the reconstruction of fenders at its bridge located just downstream. The fenders at your bridge are now the weak and unsafe section in the continuous fender system through these three bridges and are a serious hazard to navigation.

In the interest of safety to your bridge structure as well as to navigation, may we ask that you resubmit your ap-

plication with duly revised drawings for a permit to carry out the badly needed work at an early date.

Very truly yours,

DONALD H. CONNOLLY
Lt. Col., Corps of Engineers
District Engineer

(3) In 1936, subsequent to the issuance of the permit, Captain Karrick, Acting District Engineer, wrote the following letter to the Superintendent:

May 29, 1936

Toledo, Peoria & Western Railroad
Union Station
Peoria, Illinois

Attention: Mr. O. M. Limestall, Superintendent

Gentlemen:

Reference is made to the War Department permit issued by the Chief of Engineers on April 23, 1936, authorizing the reconstruction of the fenders along the channel span of your Illinois River bridge at Peoria, Illinois. At the time this permit was issued, it was understood that the proposed work was to be done immediately, but construction has not yet commenced.

Report has now been received that the left upstream fender is leaning four feet or more out into the channel and is in danger of falling into the channel at any time. Thus an actual *hazard* to navigation is created at an already narrow, inadequately protected bridge.

It is requested that the reconstruction of the fenders be started at once. Please acknowledge receipt of this letter, stating the dates for commencement and completion of work.

Very truly yours,

S. N. KARRICK
Captain, Corps of Engineers
Acting District Engineer

(4) The timber sheer fencing as constructed under the permit and as maintained for over 30 years thereafter, consisted of an upright piling every 4 feet, backed by a support piling known as a batter piling, set at an angle behind the main piling. These pilings were driven by a pile driver to the rock at the bottom of the river. The upright piling and the batter piling consisted of 12″ by 14″ timbers. The vertical piles were connected to the batter piles with cross members or braces. Along the length of the guidewall were horizontal timbers, called walers, which were bolted into place. The resulting timber guide wall. "sheer fencing" (or "shear fencing"), appears as illustrated in the photograph appearing hereafter.

(5) The sheer fencing, as thus constructed, remained essentially intact from 1936 through 1966. During that period the sheer fencing was frequently struck and damanged by river tows.

(6) Repairs to the sheer fencing were continually made during the period of its existence. As the result of the repairs, the sheer fencing remained essentially as originally constructed in 1936.

(7) The sheer fencing joined with upstream sheer fencing and formed a continuous, connecting, and joining wall of fencing from the railroad bridge to the Franklin Street Bridge upstream—a distance of approximately 350 feet. The railroad maintained its 166 feet of fencing and the owner of the Franklin Street Bridge—the city of Peoria—maintained the balance.

(8) In 1965 the State of Illinois became the owner of the Franklin Street Bridge and changed the manner of protecting it. The State replaced their portion of the sheer fencing with 4 protective cells, each cell made of sheet steel filled with concrete and of approximately 30 feet diameter.

(9) Mr. C. L. Patteson, President of the T P & W Railroad, testified that the railroad made a decision not to repair the sheer fencing or to replace it with clump pilings. He explained that the railroad was trying to collect from the people who knocked

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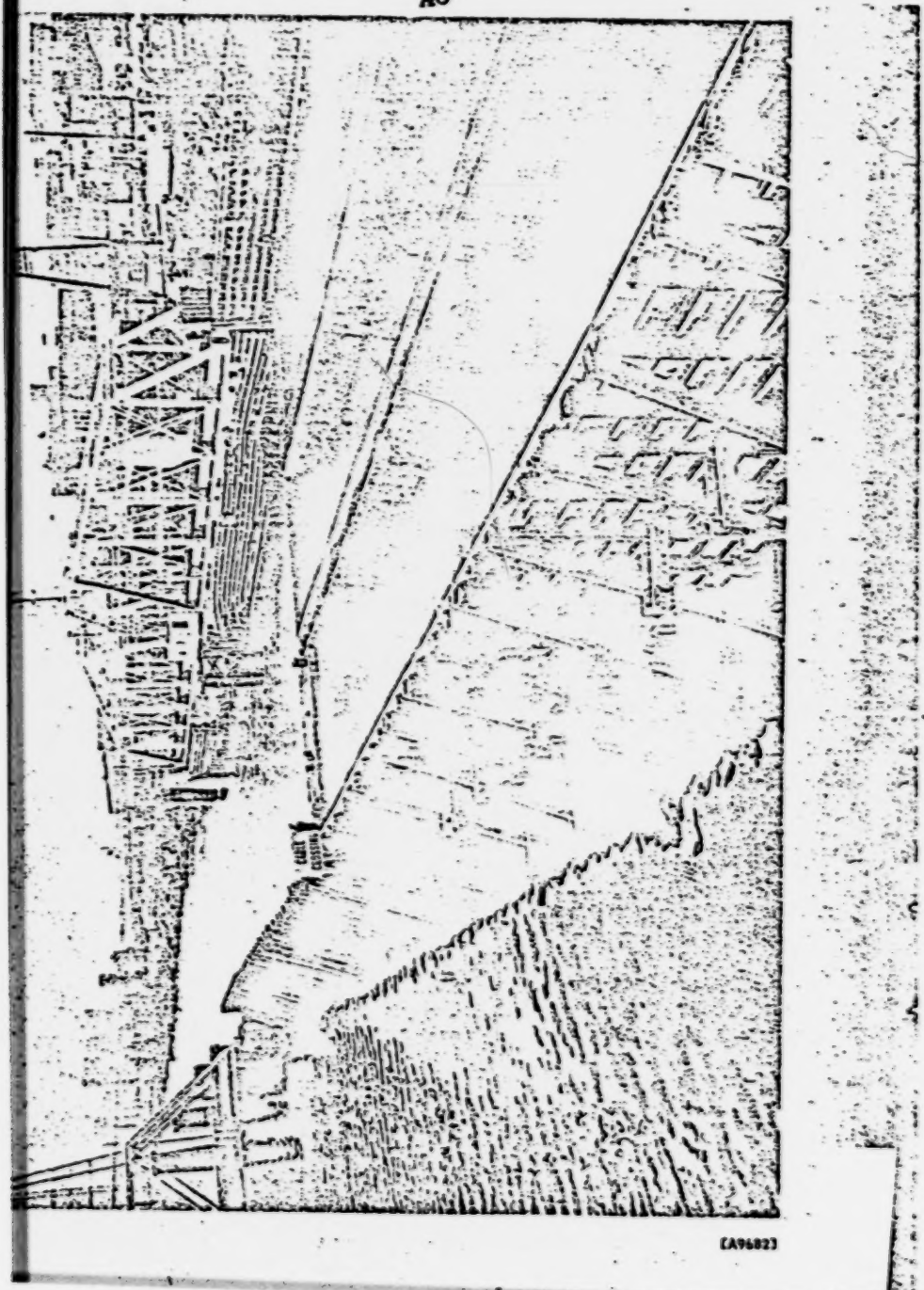

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the sheer fencing down before the railroad company would have the funds to replace the sheer fencing.

(10) In February, 1969, the upstream sheer fencing was struck by the tow of the river towboat KAY-A and the tow of the LA SALLE. These two collisions took out all but 20 feet of the 166 feet of sheer fencing that had been maintained by the railroad company for over 30 years.

(11) The railroad company obtained estimates for repairing the sheer fencing. The bids were under $6,000 for the repair of the damage done by the LA SALLE collision, and approximately $20,000 for repairing the damage done by the KAY-A. Contracts, however, were not entered into.

(12) On November 3, 1969 the tow of the WARREN HOUGLAND, consisting of 3 empty barges, demolished the remaining 20 feet of the sheer fencing and, with the fencing gone, collided with and damaged bridge Pier Number 3.

(13) Damage to the bridge pier consisted of a structural crack in the base of the pier just above the waterline. Engineering observations indicated, however, that the pier was still structurally sufficient for handling heavy trains.

The questions raised on appeal are:

(1) Did the District Court err in finding Wasson liable?

(2) Did the District Court err in finding the railroad company free from liability?

[1] We shall dispose of the first question by stating that we agree with the District Court's findings regarding the unseaworthiness of the DEL RIO as rigged at the time of the collision, and that we affirm the conclusion of the District Court that the unseaworthiness of the DEL RIO imported liability to her owner and charterer for the collision between the DEL RIO and the railroad bridge.

Wasson clearly admitted that when a vessel operator attempts to move a 105-feet wide tow through a 118-feet bridge span, an inherently dangerous situation is created,—a situation

providing an insufficient margain of safety to allow for natural hazards such as the risk of bank suction. It is clear from the testimony of the witnesses that such bank suction did in fact occur and that it was a contributing cause to the collision. Under these circumstances, we agree with the District Court's determination that the DEL RIO, as rigged, was unseaworthy for the purpose of navigating through the railroad bridge.

There remains the question of whether the railroad company had a duty to maintain reasonable protection to the channel side of Pier No. 3. If it had such a duty and breached it, we must hold that, in accordance with our decision in N. M. Paterson & Sons, Ltd. v. City of Chicago, 324 F. 2d 254 (7th Cir. 1963), damages must be equally divided between Wasson and the railroad company.

[2] We are of the opinion that a bridge owner has a duty to protect the piers of the bridge, both for the protection of the bridge and for the protection of water-borne commerce. We so held in City of Milwaukee v. Kensington S. S. Co., 199 F. 109, 111 (7th Cir. 1912), where the owner of a steamer brought suit to recover for damages incurred when the steamer, while being towed through a drawbridge, struck a stone abutment of the bridge. This Court held that the bridge owner, the City of Milwaukee, had a duty to protect the bridge abutments, which duty it breached when the timbers by which the stone abutment had been protected were allowed to rot away. There the court held as follows:

> . . . The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the city to put them there, and there keep them. Failure to do this was negligence, the proximate cause of the injury. The bridge itself was an obstruction to navigation, permitted only to serve the convenience of commerce on land. Clearly it was the duty of the city to make it as safe as was reasonably possible.

Earlier, in Vessel Owners' Towing Co., et al. v. Wilson, et al., 63 F. 626 (7th Cir. 1894), the faces of the piers of a drawbridge were built out under the surface of the water. Contractors, in replacing the bridge, removed piles which had been driven around the piers to ward off vessels. This Court stated:

> That portion of the abutment below the surface of the water was . . . a concealed and imminently dangerous obstruction to the navigation of the river. As it was placed there by the city of Chicago, so it became the duty of the city, so long as the obstruction was maintained, to so guard it that injury therefrom should not result to vessels navigating the river. Philadelphia R. Co. v. Philadelphia, etc., Towboat Co., 64 U.S. 209, 23 How. 209, 16 L.Ed. 433. That duty was sought to be discharged by maintaining spiles along the face of the obstruction, which were effectual to prevent vessels passing the draw of the bridge from coming in collision with the projecting footing courses of the abutment. The maintaining in place of these spiles, in the absence of other safeguards, was an imperative duty. Their removal was an act of negligence contributing to produce the injury here complained of. Acting under authority of the city, the contractor, as well by its contract as by the law, was liable for damages arising from the removal of the protection.

Other courts, too, have recognized the duty of a bridge owner to install and maintain structures to protect vessels from colliding with a bridge pier or abutment, or to break the force of such collision when they cannot be altogether prevented. In Pennsylvania R. R. v. The Buchanan Boys, 155 F.2d 585 (2d Cir. 1946), the railroad company sued the towboat BUCHANAN BOYS and the City of New York to recover for damages which were incurred when a barge towed by the towboat collided with the stone abutment of a drawbridge maintained by the city across the Harlem River. The Court of Appeals affirmed a decree of the District Court holding the city solely liable for negligence in opening the drawbridge, and in failing to keep the fender of the bridge abutment in proper condition.

In Southern Transp. Co. v. Philadelphia, B. & W. R. Co., 196 F. 548 (D.Md. 1912), aff'd, 205 F. 732 (4th Cir. 1913), the owner of a bridge across the Potomac River was held liable for damage to a barge which, when passing through the draw of the bridge, struck an under-water, iron-shod timber projecting from the pier of the bridge. The court rejected the contention of the bridge owner that it was the duty of vessels to keep away from the piers and abutments of the bridge and if any vessel failed to do so, it must bear its own loss and make good any damage it did to the bridge. Said the court:

> Rough and simple craft like scows and barges well serve many commercial purposes. They are more or less unwieldly. They cannot always be depended on to move with absolute precision. Collisions between them and the piers and abutments of the bridges crossing the waters over which they are towed will be not altogether infrequent.
>
> * * * * *
>
> The respondent's witnesses say that had it not been for the fender piling [,] collisions with this particular pier would have been not uncommon. Properly placed and maintained piling will usually keep vessels from coming into contact with the piers and abutments of drawbridges, and will greatly reduce the destructive effects of many of the collisions which cannot be altogether prevented.

In Cleveland-Cliffs Iron Co. v. Grosse Ile Bridge Co., 239 F. Supp. 872 (E.D. Mich. 1964), which involved a collision between a steamer and a pier of a swing bridge spanning the Detroit River, the court held that the bridge owner was negligent in failing to maintain in good condition a floating fender system erected at the pier principally for the purpose of safeguarding passing vessels.

In M. P. Howlett, Inc., v. The Catherine Carrol, 56 F.Supp. 466 (E.D.N.Y. 1944), a railroad company which owned a drawbridge crossing Newark Bay failed to maintain protecting piles at the bridge abutments. The court held that this condition

of the bridge constituted a menace to navigation, and found the railroad company liable for damages incurred in a collision resulting from the aforesaid condition. Said the court:

> It is common knowledge that fenders are provided at Bridge abutments, both for the protection of the abutment, and the boats passing through.

E.I. Du Pont de Nemours & Co. v. Pennsylvania R. R., 167 F.Supp. 80 (D. Del. 1958), involved a collision between a towed barge and a railroad swing-type bridge. The court found the railroad company, owner of the bridge, liable because of negligence constituting the sole proximate cause of the damage to the barge which had sunk after striking submerged longitudinal beams not protected by fenders. The railroad company was negligent, held the court, in waiting until the last day of the month during which the river was closed to navigation before it commenced to repair a fender system which the railroad knew was in a state of disrepair.

[3] As found by the District Court in the case at bar, the railroad company at the time of the casualty had not maintained the pier protection required by the War Department permit issued in 1936. We think that the failure of the railroad company to maintain the bridge in compliance with the War Department permit made the railroad company presumptively negligent and liable under the doctrine enunciated by the United States Supreme Court in The Pennsylvania, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), where the Supreme Court held that damages incurred in a collision between a steamship and a sailing bark were to be equally divided between the vessels inasmuch as both were in fault, the steamship for proceeding too swiftly in a very dense fog in the track of inward-and-outward-bound vessels, and the sailing bark for ringing a bell as a fog signal (instead of sounding a foghorn) in violation of an Act of Congress Fixing Certain Rules and Regulations for Preventing Collisions on the Water. (Act of April 29, 1864, 13 Stat. 58).

The *Pennsylvania* rule was stated in the following words of the Supreme Court in 86 U.S. at page 136, 22 L.Ed. 148 (*supra*):

> . . . But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

The *Pennsylvania* rule is long-settled law and should be strictly applied. Richelieu & Ontario Navigation Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422, 10 S.Ct. 934, 34 L.Ed. 398 (1890); Belden v. Chase, 150 U.S. 674, 699, 14 S.Ct. 264, 37 L.Ed. 1218 (1893); Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291, 298, 37 S.Ct. 270, 61 L.Ed. 726 (1917). That the *Pennsylvania* rule applies to bridges is made clear by the following cases: Nassau County Bridge Authority v. Tug Dorothy McAllister, 207 F.Supp. 167, 171 (E.D.N.Y. 1962), aff'd, 315 F.2d 631 (2d Cir. 1963); Dorrington v. City of Detroit, 223 F. 232, 245 (6th Cir. 1915); The Fort Fetterman v. South Carolina State Highway Dep't., 261 F.2d 563 (4th Cir. 1958), rehearing granted on other grounds, 268 F.2d 27 (4th Cir. 1959), cert. denied, 364 U.S. 910, 81 S.Ct. 272, 5 L.Ed.2d 225, rehearing denied, 364 U.S. 944, 81 S.Ct. 458, 5 L.Ed.2d 375; Shell Petroleum Co. v. Peschken, 290 F.2d 685, 687 (3rd Cir. 1961), cert. denied, 368 U.S. 900, 82 S.Ct. 172, 7 L.Ed.2d 96; Conners Marine Co. v. New York & Long Branch R. R., 87 F.Supp. 132, 135 (D.N.J. 1950).

[4] We follow the line of cases which hold that a violation of the provisions of a War Department permit imposes on the bridge owner the burden of showing that the violation could

not have contributed to the casualty. In The Fort Fetterman v. South Carolina State Highway Dep't., 261 F.2d 563 (4th Cir. 1958), rehearing granted on other grounds, 268 F.2d 27 (4th Cir. 1959), a bascule-type bridge was constructed in 1923-1925 under authority granted by the South Carolina Legislature. The plans and specifications were submitted to the War Department and a permit was issued. The permit required that the bascule spans, when fully open, be raised to an angle of 82 degrees, but in fact the spans could only be raised to a maximum angle of 71 degrees. While attempting to pass under the bridge, a vessel "crabbed" into it. Although the vessel was navigated improperly, the court ordered a division of damages because the bridge owner had not met the burden of proving that the violation of the War Department permit could not have contributed to the collision. Pertinent language of the court appears at page 567, 261 F.2d, and is set out below.

> It is the legal presumptions and conclusions of the lower court with which we must disagree. It is said by the district judge that any deviation from the approved War Department permit should not be considered unless such deviation was the proximate cause of, or contributed to, the collision and damages. We believe that the factual situation here presented calls for the clear application of the rule as stated in The Pennsylvania, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148, to the effect that the burden rests upon the party guilty of a statutory fault to show, not only that *probably* his fault did not contribute to the disaster, *but that it could not have done so.*

[5] To like effect is Petition of McMullen & Pitz Construction Co., 230 F.Supp. 726 (E.D.Wis.1964), which involved a collision at Manitowoc, Wisconsin, between a ship being towed and a bascule bridge owned by a railroad company and built after a permit had been issued to the railroad company in 1925 by the Secretary of War. The bridge owner brought a libel against the ship and her owner. Claim was also made against the owner of the towboat. The shipowner filed a cross-

libel against the bridge owner, alleging that the bridge did not have an adequate fender system and that the bridge owner was guilty of a statutory violation in that the bridge was constructed in violation of the terms of the permit as to the degree to which it could be opened. The plans for the bridge, as submitted to and approved by the Secretary of War, illustrated a bridge open to an angle of about 84 degrees and 30 minutes. The bridge as constructed opened only to a maximum angle of 79 degrees and 3 minutes. On page 730 the court made the following statement of the law, which we approve:

> Where a bridge owner fails to comply with the plans its [sic] submits for approval, it is not per se liable for damages resulting from a collision if the violation had nothing to do with the collision. City of Milwaukee v. Kensington S. S. Co., 199 F. 109 (7th Cir., 1912); Missouri River Packet Co. v. Hannibal & St. Joseph R. Co., 2 F. 285 (C.C.W.D.Mo.1880). This Court believes that the question as to whether this violation was causal is speculative except for the rule hereinafter set forth. The law imposes a burden upon the statutory violator to show that the breach could not have contributed to the disaster with any reasonable possibility where the variance is substantial. The Pennsylvania, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873); The Fort Fetterman v. South Carolina State Highway Dept., 261 F.2d 563 (4th Cir., 1958), rehearing granted on other grounds, 268 F.2d 27 (4th Cir., 1959).

Applying the above-stated rule of law, the court then said, 230 F.Supp. at 731:

> . . . This court is bound by the rule of The Pennsylvania case. It is unable to say that the deviation from the approved plans did not with a reasonable possibility contribute to this accident. Therefore, the Court finds that the bridge must be held causally negligent due to its deviation from the approved plans.

In J. F. Schoellkopf, Jr.—Canal St. Bridge, 1961 American Maritime Cases 391 (N.D.Ind.1960), the Canal Street Bridge was a double-leaf bascule bridge which crossed the Indiana

Harbor Canal. It was constructed under a War Department permit issued in 1927 and requiring the presence of 3 rows of fender timbers along the face of each bridge abutment. In 1943 the War Department issued a permit requiring 2 additional fender pile clusters. Up until 1952 the bridge owner had maintained the fender protection in compliance with the permits. Since 1952, however, the bridge was out of operation and both leaves of the bridge had been fixed in a raised position. On July 15, 1957, as a result of various accidents involving the bridge and its appurtenances, no protection fenders remained along the northwest abutment of the bridge. On that date the steamer J. F. Schoellkopf, Jr. collided with the northwest abutment of the bridge. The Indiana District Court of this seventh circuit found the bridge owner negligent for failing to maintain fender protection at the situs of the collision. Said the court, in its Conclusions of Law:

> 7. At all times material hereto the City of East Chicago, Indiana, had the absolute duty to maintain and repair the Canal Street Bridge and its appurtenances and the pile cluster lakeward of the Northwest bridge abutment in strict conformity with the War Department permits under which they were erected so as to permit vessels to negotiate the bridge draw with safety.
>
> 8. As they were maintained at the time and place in question, the Northwest abutment of the Canal Street Bridge and the pile cluster just lakeward thereof deviated materially from the War Department permits under which they were erected and together created a condition whereby the bridge was a nuisance, a menace and an unlawful, unreasonable and dangerous obstruction to navigation.
>
> 9. Had the Canal Street Bridge, its abutments and appurtenance, and the pile cluster been maintained as required, the steamer's starboard side either would have contacted only the pile cluster or would have contacted fender timbers instead of the concrete abutment and either she would have incurred no damage at all or her damage would have been substantially reduced.

1961 American Maritime Cases, at 397-398.

[6] In the case at bar Wasson contends that the railroad company, in addition to violating the provisions of the War Department permit issued in 1936, violated the provisions of an Illinois statute, Ch. 121, § 193a, Ill.Rev.Stat. 1969, which requires bridge owners to maintain adequate pier protection for their bridges. Against this contention the railroad company appears to argue that the Federal Government, by virtue of the enactment of the Rivers and Harbors Appropriations Act of 1899 (Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. § 401 et seq.), has divested The State of Illinois from all jurisdiction or authority over the Illinois River so far as the erection therein of structures affording protection to bridge piers is concerned, and that the Illinois statute is therefore void. We cannot agree.

At the outset, we take judicial notice of the fact that the Illinois River lies wholly within the State of Illinois. *See* Hubbard v. Dunne, 276 Ill. 598, 612-613, 115 N.E. 210 (1971). Next, we point out that the United States Supreme Court has repeatedly held that where a Federal law is applicable requiring consent of the Federal Government, there is a concurrent or joint jurisdiction of the State and Federal Governments over the erection of structures obstructing the navigation of a navigable stream lying wholly within a state. Lake Shore & M. S. Ry. v. Ohio, 165 U.S. 365, 17 S.Ct. 357, 41 L.Ed. 747 (1897); Cummings v. Chicago, 188 U.S. 410, 23 S.Ct. 472, 47 L.Ed. 525 (1903); Montgomery v. Portland, 190 U.S. 89, 23 S.Ct. 735, 47 L.Ed. 965 (1903).

In Lake Shore & M. S. Ry. Co. v. Ohio, *supra*, the United States Supreme Court held that the Congressional delegation to the Secretary of War of authority to direct changes in existing bridges over navigable waters of the United States or in bridges to be erected under legislative authority of any state, for the purpose of preventing obstructions to navigation, showed no intention by Congress to exercise exclusive control over navigable waters lying entirely within a state, and did not deprive states

of their power to compel the removal or alteration of bridges erected over such waters without their authority.

[7] It is long-established doctrine that the authority of a state over navigable waters lying entirely within its limits is plenary, subject only to such action as Congress may take in execution of its power to regulate commerce among the several states. Montgomery v. Portland, 190 U.S. 89, 23 S.Ct. 735, 47 L.Ed. 965 (1903), where the Supreme Court said, 190 U.S. at 106, 23 S.Ct. at 737:

> . . . we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and state Governments.

In Escanaba Co. v. Chicago, 107 U.S. 678, 683, 2 S.Ct. 185, 27 L.Ed. 442 (1883), the question was the validity of regulations made by the City of Chicago in reference to the closing of bridges across the Chicago River between certain hours of each day. These regulations were alleged to be inconsistent with the power of Congress over interstate commerce. The Supreme Court said:

> The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.
>
> But the States have full power to regulate within their limits matters of internal police . . . This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority . . . Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State . . . When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may

> interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield . . . But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. . . . 107 U.S. at 683, 2 S.Ct. at 188.

Likewise, in Cummings v. Chicago, 188 U.S. 410, 430, 23 S.Ct. 472, 47 L.Ed. 525 (1903), the Supreme Court held that the tenth section of the Rivers and Harbors Appropriations Act of 1899, upon which the permit of the Secretary of War was based, and was not so worded as to compel the conclusion that Congress intended to ignore altogether the wishes of the State of Illinois in respect of structures in navigable water that are wholly within its limits. Said the court:

> The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.

188 U.S. at 431, 23 S.Ct. at 477.

Several courts have applied the *Pennsylvania* rule to the violation of state statutes or local ordinances. The Amiral Cecille, 134 F. 673 (D.Wash.1905), involved an ordinance of the City of Tacoma which prohibited the anchoring of a vessel in a prescribed area of the harbor without first receiving a permit from the harbor master. A vessel violated the ordinance and, while unlawfully anchored, was hit by another vessel in a dense fog. The Court found the moving vessel at fault because it was not navigated with care appropriate to existing conditions. The court also found that the anchored vessel was a contributing

cause of the collision because it did not satisfy its burden, as imposed by the *Pennsylvania* rule, of showing that its statutory violation could not have contributed to the accident.

In both The Limon, 35 F.2d 730 (1st Cir. 1929), and The Vera, 224 F. 998 (D.Mass.1916), aff'd, 226 F. 369 (1st Cir. 1915), a Massachusetts statute delegated to the harbor master of Boston the power to establish anchoring areas in Boston Harbor. Vessels anchored outside the permitted areas were involved in collisions and, in each instance, the court held that the anchored vessel had the burden of proving that her violation of the harbor regulations could not have contributed to the collision.

It has repeatedly been said that the violation of "any statutory requirement" causes a presumption against the party in default, and that when a collision occurs it is obligatory upon the party who has failed to comply with the statute to show that such default certainly did not and could not possibly contribute to the disaster. *See* The Hercules, 80 F. 998, 1001-1002 (4th Cir. 1897); The Jay Gould, 19 F. 765, 769 (E.D.Mich.1884).

It is our opinion, so far as the Illinois River is concerned, that Congress is enacting the Act of March 3, 1899, 30 Stat. 1151 (33 U.S.C. § § 401, 403) dealing with the construction of bridges over navigable rivers and with obstructions to navigable waters in general, did not intend to dispossess the State of Illinois of authority to legislate regarding the protection of bridge piers. We think that Congress simply intended by this legislation to subject bridge owners, who by Illinois statute are obligated to protect the piers of their bridges, to the further obligation of erecting pier-protection structures in accordance with plans approved by the Secretary of War (now the Secretary of Transportation).

[8] We find and conclude that there is no conflict between the aforementioned Illinois statute and existing Federal statutes, and that the Illinois statute does not run afoul of the supremacy

clause of the United States Constitution. We are of the opinion that it is a valid statute.

[9] As to whether the Illinois statute was violated by the railroad company, we believe that the findings of the District Court and the evidence in the record have established beyond question that the railroad company was in violation of the Illinois statute at the time of the collision.

Applying the *Pennsylvania* rule to the case at bar, we are of the opinion that the railroad company failed to meet its burden of showing that its non-compliance with the permit issued by the War Department could not have been one of the causes of the collision between Barge M-4 and the bridge pier; further, we are of the opinion that the evidence clearly violated the provisions of Chapter 121, § 193a, Ill.Rev.Stat. 1969, and that here, also, the railroad company failed, under the *Pennsylvania* rule, to meet its burden of showing that such violation of the state statute could not have been one of the causes of the aforesaid collision.

The District Court found that the railroad company complied with the War Department permit only up to 1967,—thus clearly implying non-compliance after 1967,—and the District Court made no determination that the failure of the railroad company to comply with the permit could not have contributed to the 1970 collision with any reasonable possibility. In view of all of the foregoing, the District Court erred in its determination that the railroad company was free from contributory fault and hence free from liability.

[10] It was error for the District Court to have failed to apply the *Pennsylvania* rule in view of its findings and the evidence in the case. Under the well-established admiralty rule of divided damages, where two parties are at fault in causing a collision and resulting damages, both parties must bear equally the damages caused by the collision.

The admiralty doctrine of an equal division of damages in the case of collision between two vessels when both are at fault,

has long prevailed in this country as well as in England. Belden v. Chase, 150 U.S. 674, 14 S.Ct. 264, 37 L.Ed. 1218 (1893). Holding, as we do, that the District Court was in error in finding the railroad company free from liability, and being of the opinion that this case clearly calls for the application of the divided-damages rule of admiralty, the judgment of the District Court is hereby

Affirmed in part, reversed in part, and remanded for further proceedings in conformity with this opinion.

STEVENS, Circuit Judge (concurring).

There is some uncertainty in my mind concerning the railroad's obligation under the War Department permit after 1967 when the State of Illinois removed its upstream portion of the sheer fencing connecting the railroad bridge and the Franklin Street bridge. I am also uncertain about the legal significance of the Illinois statute in this kind of proceeding. However, I have no doubt that there was mutual fault because the railroad completely failed to discharge its duty to provide adequate pier protection. *Cf.* City of Milwaukee v. Kensington S. S. Co., 199 F. 109 (7th Cir. 1912). I therefore agree that the damages should be divided. *See* N. M. Paterson & Sons, Ltd. v. City of Chicago, 324 F.2d 254, 257-258 (7th Cir. 1963).

Perhaps I should add that I cannot accept Wasson's argument that the railroad should bear the entire loss because the increasing demands of commerce over the years since 1857, when the bridge was originally constructed, have transformed a once lawful structure into an illegal obstruction to navigation. Assuming arguendo that the legal premise is valid, I am nevertheless satisfied that a private party may not, with impunity, simply knock the bridge down with an unseaworthy tow of barges.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Illinois,
Northern Division.

Findings and Conclusions of the District Court

The Court: Well, gentlemen, I do find all of the essential issues here in favor of the claimant. I will make some specific findings of fact later, but let me just discuss the basis of that briefly.

I do not think the Illinois statute is capable of interpretation to require anything on the part of the Railroad here other than the Railroad did at one time or another comply with it. I do not claim to understand, because I think it is ambiguous, just what the Illinois statutes contemplate in the way of adequate pier protection contiguous to the channel of the River. But I do not think it is necessary to hold the statute unconstitutional or to decide questions of supremacy, to decide that it is not applicable because of either preemption or supremacy of Federal law; because I just do not think it is capable of interpretation to require something of the Railroad which would have prevented this accident. In substance, I do not think statutory or case law, as I have been able to read it, does mean that established structures in the navigable waters which have not been the subject of any actions by any authority or navigation interests to be removed as hazards to navigation can be considered a hazard to navigation, especially a structure which provides an open area for navigation 118 feet wide and embracing the channel on the sailing line of the River and the swing span which is capable of being swung out of the way for navigation which would be too high to pass under the bridge otherwise.

I just do not think that river traffic can continually increase its size and weight, length and breath to the point where it becomes dangerous under the natural river conditions to navigate it through existing bridges, which I think are presumed to be there as a matter of right after any substantial number of years without action being taken by navigation interests to remove them.

Now, I find that the Court has jurisdiction of the parties and the subject matter of this cause. If that is properly a conclusion of law, I conclude that.

I find as facts the following special findings, as stipulated by the parties:

Plaintiff, Charles N. Wasson, doing business as Wasson Towing Company, was at all times material hereto the owner of the tow boat "Del Rio"; that plaintiff, Wasson Towing Service, Inc., a Mississippi Corporation, at all times material hereto was the operator of the tow boat "Del Rio" under a bareboat charter, which is in evidence.

That claimant, Toledo, Peoria and Western Railway Company, a Delaware Corporation, at all times material hereto was the owner and operator of a railroad bridge spanning the Illinois River between Peoria, Illinois, and East Peoria, Illinois.

That complainant, Cargo Carriers, Inc., a Delaware Corporation, at all times material hereto was a bareboat charterer of the steel cargo barge M-4.

That on February 12, 1970, the two boat "Del Rio" pushing twelve barges loaded with grain, including the M-4, was downbound in the Illinois River and as such constituted a single vessel within the normal contemplation of that term.

That on February 12, 1970, at about 6:05 a.m., the tow of the "Del Rio" more specifically the M-4, the port lead barge of the tow, came in contact with the left descending, or east pier, of the Railroad bridge adjoining the channel with resulting damage to the barge and to the bridge.

I further find facts, about which there may have been some dispute, at least not the subject of stipulation, the "Del Rio" is a tow boat of American registry, 111.3 feet in length, 30 feet in width, 3200 horsepower, twin screws with two steering rudders and four flanfing rudders.

That, as known to the management of its owner and charterer, on February 12, 1970, the "Del Rio" was pushing twelve loaded grain barges arranged three wide and four long. Ten of the barges were 195 feet in length with two of the barges 200 feet in length. The barges were 35 feet in width each. The total length of the tow was 785 feet for the starboard and center strings and 780 feet for the port string. The total length of the "Del Rio" and its tow was 896.3 feet. The width of the tow was 105 feet.

I find in such configuration this vessel or tow was too wide at that length to be safely navigated through the various bridges at Peoria without damage thereto or to their appurtenances.

That the Franklin Street bridge is immediately above or upriver of the T P & W Railroad Bridge. Because of the Railroad Bridge crossing the river at an angle rather than directly perpendicular, the distance between the Franklin Street Bridge and the Railroad Bridge varies from one side of the channel to the other. The distance between the east channel pier of the Franklin Street Bridge and the east channel pier of the T P & W Railroad Bridge is approximately 350 feet.

The T P & W Railroad Bridge was originally constructed in the mid-nineteenth century; that Pier Number 3, or the east channel pier here involved, was renewed in 1906 or 1907; and on February 12, 1972, the T P & W Bridge was in reasonably good repair and condition, in daily use with a useful life under normal maintenance of at least twenty years.

On February 12, 1970, Pier Number 3 was not protected by previously existing guidewall, or shear fencing, or by timber whale protection, such previously existing protection having

been destroyed by numerous prior hammerings of river traffic, primarily large tows of steel barges.

The tow boats "LaSalle" and "Kay-A" and their respective tows collided with the shear fencing protecting Pier Number 3 on February 4 and February 19, 1969 respectively; and that the shear fencing was not required or replaced following those collisions.

That when the port lead barge of the "Del Rio" tow, the M-4, came in contact with the substantially unprotected Pier Number 3 on February 12th, 1970, the pier broke off, causing the fixed bridge span resting thereon to collapse as well.

That immediately following the collision the barge, M-4 did ride up on the stub of Pier Number 3 a distance of approximately the width of the said pier and came to rest on top of said pier stub around one foot above the then existing river level.

All of the dimensions of the span between the piers of the T P & W Bridge and the size of the tow being pushed by the "Del Rio" on February 12, 1970, were known by O. P. Williamson, Vice President of the plaintiff charterer.

The Court further finds, pursuant to stipulation of counsel for Charles N. Wasson, the motor vessel "Del Rio" and Wasson Towing Services, Inc., and counsel for Cargo Carriers, Inc., that the claim of Cargo Carriers, Inc. in the sum of $13,993.90 shall be allowed as damages payable only in case of liability of the "Del Rio" or its owners or operators and subject to the Court's determination of the possible proportionate liability or limitation of liability as sought by Wasson.

The Court finds that the primary and effective cause of the collision on February 12, 1970, between the "Del Rio" and the T P & W Bridge was the excessive width of the tow at three barges or 105 feet wide, in conjunction with a length of four barges and a weight in excess of forty million pounds, in conjunction with the known opening between bridge piers of successive bridges not over 400 feet apart involving openings of

about 120 feet, leaving less than 15 feet for lateral maneuvering between those bridges and the spans of the piers thereof requiring maneuvering close to the shore with recognized possibility of unfavorable navigational conditions developing therefrom and the inability of the vessel rigged, as aforesaid, to stop forward motion when the danger of collision became apparent.

The Court finds that under these conditions the vessel in that configuration was not seaworthy and that the lack of seaworthiness under the conditions known to exist were with the knowledge and privity of the owner and charterer both.

Accordingly, the Court concludes, as a matter of law, that there can be no exoneration; that petitioners in this cause are liable for the damages to the Toledo Peoria and Western Railroad Company and to Cargo Carriers, Inc., without limitation.

The Court further finds that there was no contributory negligence on the part of the Toledo, Peoria, and Western Railroad in permitting its bridge to exist on February 12, 1970, under the circumstances here otherwise found.

The Court concludes simply because it does not believe it has been cited to any authority and has found no authority which requires the railroad to protect its bridge against the circumstances which developed on February 12, 1970.

Accordingly, the petition for loss sharing under the statute and cases is denied.

Now, as indicated this morning, the Court will reserve judgment as to the proper amount of damages due to the railroad and will permit counsel to make proposals in that regard with citations to the transcript and the exhibits in support of their factual contentions and citations to any case law or other law in support of their positions on proper elements of total damage in this kind of a case under the circumstances proved.

I perhaps should find as a fact the fact that I understand to be undisputed that the railroad bridge has not been replaced and

the railroad is now involved in alternative means of crossing the river, claiming damages only for a limited period, it being recognized that expenses of alternative means would not be justified for as long a period as has transpired since February 12, 1970.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Illinois
Northern Division.

DECISION AND ORDER ON DAMAGES

At the conclusion of the trial herein on July 19, 1972, the court announced its findings of fact and conclusions of law, determining all of the liability issues against the petitioners and in favor of the claimants, Toledo, Peoria and Western Railroad Company and Cargo Carriers, Incorporated. It had also been stipulated between petitioners and said claimant Cargo Carriers that if petitioner's liability were determined and undiminished through any limitation, the claim of damage to said Cargo Carriers, in the amount of $13,993.90, would be allowed. The court reserved judgment on the amount of damages due to the railroad and invited further proposals by the parties for findings and conclusions, and on damages, with briefing of applicable points of law. Such briefs have now been filed.

Without conceding that liability has been correctly determined by the court, or waiver of any rights in that regard, petitioners propose no additional findings of fact or conclusions of law; and on damages argue that no more than $415,922.22 has been shown by the railroad.

The railroad asserts total damages of $919,247 and claims prejudgment interest, and proposes, inter alia, the following additional general findings of fact which the court considers supported by the evidence.

Accordingly, in addition to previous findings, and any others implicit in this memorandum, the court Finds:

1. The railroad fully complied with its War Department permit concerning the bridge, until the State of Illinois, in 1967, removed its continuance sheer fence for a distance of 208.8 feet downstream from the Franklin Street Bridge.

2. Neither government authority nor any shipping or barge freight interests asked or ordered the railroad to alter its fencing or pier protection.

3. The time reasonably necessary for restoration of the bridge as an operating asset of the railroad was one year after the damage of February 12, 1970.

4. The savings to the railroad in not having to staff and maintain the bridge since the damage on February 12, 1970 is $50,000 per year, which is a reasonable and fair credit against extra expense due to the damage.

5. The cost of restoring the bridge for use is less that its fair value on February 11, 1970.

The controlling principle on damages when property is tortiously destroyed is that the owner should receive the money equivalent of the destroyed property and thereby be put in as good a position financially as if the property were not destroyed. Value is the thing. Standard Oil v. Southern Pacific, 268 U.S. 146 (1924). Petitioners here seem to concede this general proposition and make their attack on the asserted burden of proof of one claiming damages and the duty to mitigate damages. They argue and seek to show wherein claimant here has not proven its claim. It is asserted by petitioners that:

A. The claim for rebuilding the bridge should be reduced by eliminating any extra cost of rebuilding the concrete support pier and from using wrought iron instead of structural steel.

B. The rebuilding cost should be reduced for depreciation proportional to the ratio that the utilized life of the span bears to total service life expectancy.

C. The claims for detour and switching expense should be reduced to seven months as the reasonable period for rebuilding.

Petitioners compute their conceded amount of damages by deducting from the railroad claim of $919,247 the amounts believed unsupported by the evidence in those three categories. They will be dealt with here in inverse order.

With respect to C, the court has found as a fact that reasonable rebuilding time is one year. The clear obligation to mitigate damages required rebuilding in that period; and since this was not done, the railroad chose to accept continuing consequential damages thereafter. While there was some competent testimony that the rebuilding task could be completed in seven months, as petitioners argue, that opinion is believed theoretical and unrealistic by the court. The railroad's estimate of one year is believed more reasonable and is credited.

With respect to B, it would be totally unrealistic to reduce the rebuilding cost by some depreciation rate in computing damages, on the theory that otherwise the railroad gets something new for what was old, because when rebuilt, the bridge as a whole will really not last longer than it would have without the accident, in spite of the new section. The railroad asserts damage theories which would produce a far greater damage allowance than rebuilding cost plus consequential expense. Those theories are likewise unsound because the railroad is put back where it was when it has the bridge rebuilt (or is allowed the cost of rebuilding) and has recovered its actual extra expenses for the rebuilding period. It is not entitled to more than that, but it is not made whole with less.

In relation to petitioner's proposed deductions from the railroad claim, this leaves only item A, involving the matters of structural steel vs. wrought iron, and whether the remaining base of Pier 3 could be used in the reconstruction. There is no evidence that the latter could not be used, as it remained standing in the river and it was not shown to be unsound. Similarly, there is simply no evidence to dispute the asserted workability of steel at less cost. Petitioners would deduct $183,095 from the railroad claim of $919,247 for these items; but this gives no

credit for adjustments the railroad had already made on this account in constructing its final claim at the trial. Based on those adjustments, and reasonable rounding off of too detailed estimates, it is the considered judgement of this court that the railroad actually sustained damages, through reconstruction costs and consequential expenses, of $800,000.

This leaves for consideration the matter of interest prior to judgment. It is quite well settled in admiralty that this is a matter in the discretion of the court to be granted at 6% if damages are unreasonably withheld, or to be denied if there is unreasonable delay in asserting claim. Here the railroad filed suit within about 62 days of the collision which caused the damage, which suit eventually was merged into this action. There was substantial delay in discovery, the parties having mutually moved for extensions of time on several occasions, but this delay cannot be considered as solely caused by claimants. In the view of this court, the withholding of damage tenders by petitioners, and the attempt to escape or limit recoverable damages when petitioners knew full well of the unseaworthiness of its tow due to size, and of the extreme danger and past damages to claimant's bridge and accoutrements caused by oversize barge tows, fully justify the award of interest. Such interest should run from the date of collision to the date hereof on amounts actually paid out by the railroad, but not on the cost of rebuilding the bridge, which was not actually done. The amount subject to interest is $480,000, and interest to date increases total damages found hereby to $878,652. No interest is awarded on the stipulated damages of Cargo Carriers, Incorporated.

It Is Ordered, accordingly, that:

(1) Judgment be entered in favor of claimant, Toledo, Peoria & Western Railroad Company, and against both petitioners herein, jointly and severally, in the sum of $878,650.

(2) Judgment be entered in favor of claimant, Cargo Carriers, Incorporated, and against both petitioners herein, jointly and severally, in the sum of $13,993.90.

(3) That costs herein be taxed against petitioners.

/s/ ROBERT D. MORGAN
Robert D. Morgan
United States District Judge

Entered: November 16, 1972

AUG 17 1974
MICHAEL RODAK, JR. CLERK

No. 73-2031

In the
Supreme Court of the United States
October Term, 1974

The Toledo, Peoria & Western Railroad Company,
Petitioner,

vs.

Charles N. Wasson, doing business as Wasson Towing Company, Owner of the Motor Vessel DEL RIO, and Wasson Towing Service, Inc., Bareboat Charterer of the Motor Vessel DEL RIO, For Exoneration From or Limitation of Liability,
Respondent and Cross Petitioner.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2035

The Toledo, Peoria & Western Railroad Company,

Petitioner,

vs.

Charles N. Wasson, doing business as Wasson Towing Company, Owner of the Motor Vessel DEL RIO, and Wasson Towing Service, Inc., Bareboat Charterer of the Motor Vessel DEL RIO, For Exoneration From or Limitation of Liability,

Respondent and Cross Petitioner.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents pray that the Writ of Certiorari prayed for by petitioner herein to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on April 17, 1974 shall not issue.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THERE EXISTS NO CONFLICT BETWEEN THE COURTS OF APPEALS

The alleged conflict between the decision below and the decision of the Ninth Circuit in *Oregon* v. *Tug Go-Getter,* 468 F.2d 1270 (9th Cir. 1972) is illusory. The *Go-Getter* case involved a bridge built in 1954 under a permit which *did not require pier protection.* 468 F.2d at 1272, 1273. In the present case, the applicable 1936 War Department permit *required* that the bridge maintain pier protection. This distinction makes *Go-Getter* an entirely different case than here presented, where the applicable common law authorities, federal permit and governing Illinois statute required adequate pier protection, in good repair. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.,* 205 F. 732 (4th Cir. 1913); *M. P. Howlett, Inc.* v. *The Catherine Carroll,* 56 F. Supp. 466 (D.C.N.Y. 1944); *City of Milwaukee* v. *Kensington S.S. Co.,* 199 F. 109 (7th Cir. 1912); *Wilmington Transp. Co.* v. *Standard Oil Co.,* 53 F. 2d 787 (9th Cir. 1931); *Cleveland-Cliffs Iron Co.* v. *Grosse Isle Bridge Co.,* 239 F. Supp. 872 (E.D. Mich. 1964); *The Fort Fetterman* v. *South Carolina State Hwy. Dept.,* 261 F.2d 563 (4th Cir. 1958).

There exists no meaningful conflict among the Courts of Appeals on this issue.

II.

THE RULE OF DIVIDED DAMAGES IS WELL ESTABLISHED

In 1855 the United States Supreme Court unanimously settled on the Admiralty principle of divided damages, saying:

> "Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault. The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss.... This seems now to be the well-settled rule in English Admiralty. (cases omitted)
>
> Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." *The Catherine* v. *Dickinson,* 58 U.S. (17 How.) 170, 177-78 (1855).

The rule of equal division in cases of mutual fault has been consistently adhered to ever since. Thus in 1952 this Court said,

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that mutual wrong-doers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third parties." *Halcyon Lines* v. *Haenn Ship C. & R. Co.,* 342 U.S. 282, 284 (1952).

The present case offers no good reason to abandon the century-old rule. The sole fault attributed to Respondent — Towing Company below was in making up its tow three barges wide. The fault of the Railroad was found to be

its failure to maintain 166 feet of sheer fencing and pier protection, the purpose of which has been recognized by many courts:

> "The bluff of (the vessel's) bow struck the fender piling designed to prevent collisions between vessels and the northernmost pier, or to break the force of such collisions as might take place.
>
> • • •
>
> Properly placed and maintained piling will usually keep vessels from coming into contact with the piers and abutments of drawbridges, and will greatly reduce the destructive effects of many of the collisions which cannot be altogether prevented. *Southern Transp. Co.* v. *Philadelphia, B. & W. R. Co.*, 196 F. 548, 549, 550-51 (D. Md. 1912), *aff'd*, 205 F. 732 (C.A. 4, 1913).
>
> It is common knowledge that fenders are provided at bridge abutments, both for the protection of the abutment, and the boats passing through. *M. P. Howlett, Inc.* v. *The Catherine Carroll*, 56 F. Supp. 466, 476 (D.C.N.Y. 1944)

The record also indicates that this was the purpose of sheer fencing here.

> "Q. At that time, Captain, the time of this accident, was there any other pier protecting this east channel or pier number 3 of the TP&W Bridge? I have in mind either protective cells, such as we have depicted here at the Franklin Street Bridge, pile clusters, sheer fencing or any other pier protection.
>
> A. No, sir, none whatsoever. It was bare concrete pier.
>
> Q. Is this sheer protection also referred to as a guidewall? Is that a synonym for 'sheer protection?'
>
> A. Yes, sir, that's the purpose of a sheer fence, to sheer a tow off a protected pier or such.

Q. To straighten out the tow and guide it through a channel, is that fair to say?
A. Yes, absolutely."
A.58

In view of the foregoing, Circuit Judge Stevens concluded below, "I have no doubt that there was mutual fault because the railroad completely failed to discharge its duty to provide adequate pier protection.... I therefore agree that the damages should be divided." (Pet. A-23). Petitioner has not presented any reasons which indicate that such a conclusion was incorrect.

Finally, Petitioner quotes the language of *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) to support its petition here. But that reliance is misplaced since *Moragne* dealt solely with the right to recover for wrongful death under general maritime law, and had nothing to do with the issues raised here.

To say that because of Petitioner's misconception of legal causation, there exist significant and recurring problems concerning the divided damages rule is to extend the purposes of the certiorari procedure beyond reasonable limits.

Moreover, even if this Court were to conclude that the established maritime rules of divided damages were appropriate for review, this is an inappropriate case. Here this bridge had stood for 113 years, and withstood the hammerings of river traffic because, and only so long as, adequate pier protection was maintained. Respondent deliberately stopped repairing the sheer fencing, prior to this casualty. (A.206, 207, 209) Its officers knew that endangered the bridge piers. (A.214, 215) Replacement with a steel and concrete cell would have cost $30,000 at

most. (A.209) If the expense of $30,000 had been incurred, as was the duty of the bridgeowner, its damages here would have been $30,000 or less. Accordingly if damages are not to be equally divided as decreed by the Court of Appeals, then the railroad's damages should be limited to $30,000 — instead of over $400,000. That, however, is far from a typical case that arises in connection with the divided damages rule.

III.

THE PENNSYLVANIA RULE WAS PROPERLY APPLIED BELOW

For the reasons stated by the Court of Appeals, in a scholarly opinion, application of the *Pennsylvania Rule* was proper.

Moreover here the cause in fact, and proximate cause, of the damages complained of was plainly the railroad's failure to maintain its pier protection in good order and condition. The purpose of such sheer fencing is to sheer vessels off and thus prevent impacts with bridges. (A.58) Accordingly it was not strictly necessary for the Court of Appeals to decide the case on a *Pennsylvania Rule* basis, since another basis existed — that the absence of pier protection was the actual proximate cause of the railroad's damages.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for the issuance of its writ of certiorari to review the decision below.

Respectfully submitted,

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